SUPREME COURT U. S.

No. 408

In the Supreme Court of the United States

OCTOBER TERM, 1970

ROBERT JOSEPH MOLKENBUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

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No. 686

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of unlawful possession of merchandise stolen from an interstate shipment in violation of 18 U.S.C. 659. He was tentatively sentenced to the maximum under 18 U.S.C. 4208(b) and ordered committed for study, but chose to appeal immediately. The court of appeals affirmed the conviction.

The questions raised concern the validity of the seizure of the stolen merchandise. The evidence at

a hearing on the motion to suppress and at trial showed that petitioner operated an interline freight truck owned by Hennis Truck Lines. On April 1, 1969, while the Hennis truck was parked in front of a house owned by petitioner, but occupied by his nephew, co-defendant Toler, petitioner was observed by an informer handing three boxes over the fence to Toler (Tr. 23-24).[1] The informer was in a house across the street visiting her daughter. The police learned that the stop at Toler's residence had not been authorized by the company (H.Tr. 31-32; Tr. 24).

On April 16, 1969, the police received information that the Hennis truck was parked in front of Toler's residence. This time the original informer's daughter contacted the police and told them that freight was being taken from the truck and carried to the rear of the house (H.Tr. 33; Tr. 77-78).[2] Upon arrival, the police immediately arrested petitioner in front of the house but conducted no search of him or the premises (H.Tr. 8). Petitioner admitted removing a power mower from the truck and said that the officers could verify his right to make the stop by calling his dispatcher. He led the officers to the back of the house into the kitchen. (H.Tr. 14-16). As they were entering an officer from a police unit which

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[1] "H.Tr." and "Tr." refer respectively to the transcript of the hearing on the motion to suppress and the trial, both of which have been filed with this Court.

[2] The mother was visiting the daughter at the time. As the daughter was calling, her mother and sister reported to her that boxes were being taken off. (Tr. 67).

had driven into the alley at the rear of the house (H.Tr. 15-16, 24; Tr. 72-75, 88) called their attention to a carton in the yard. From the alley, the officers had seen in the yard a large partially opened carton exposing several shirts in boxes and plastic bags marked "Campus" brand (H.Tr. 25-27, Tr. 74-75, 89, 92-94, 97). The officers then arrested Toler, who was walking out of the kitchen (Tr. 81-82, 84). The carton was removed to police headquarters and an inventory of its contents was taken. A shipping document was found identifying the manufacturer and the order number of the contents (Tr. 95-96, 104).

The district court denied the motion to suppress (A. p. 10,[3] H. Tr. 42, see also Tr. 90). The court of appeals affirmed, holding that the police had probable cause to arrest Toler and, incidentally thereto, to seize from the yard the carton which was in plain view and which was reasonably believed to be stolen merchandise.

Petitioner argues that there was no probable cause for the arrest of Toler or himself, and that in any event, the seizure without a warrant could not be justified as incident to the arrest under *Chimel* v. *California*, 395 U.S. 752. The facts summarized above show probable cause to believe that petitioner and Toler were engaged in a scheme whereby petitioner left in Toler's back yard merchandise he was supposed to transport. This was particularly true after Toler was arrested, since by that time the large

[3] "A" refers to petitioner's separate appendix on file with this Court.

box of shirts in the back yard had been spotted. Since the officers were validly on the premises [4] and had ample probable cause to believe that the large box of shirts had been stolen, the officers had a right to seize the stolen package before its contents could be dissipated. *Ker* v. *California*, 374 U.S. 23. See *Chambers* v. *Maroney*, 399 U.S. 42.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[4] Petitioner argues that the government was inconsistent in relying on the fact that he invited the officers in to make a telephone call. The evidence at the motion to suppress traced the movements of both groups of officers, those who arrested petitioner and those who arrested Toler, and showed that both were validly on the premises. It was clear, however, that the box was seen from the alley and that it was the group who arrested Toler who called the box to the attention of the others.

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